Supreme Court, U.S.
FILED

No. 99 867 AUG 26 1999

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

MARY SMYLY,

Petitioner,

versus

IBM CORPORATION, Et Al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QESTIONS PRESENTED FOR REVIEW

1. Do the various and not uniform experimental procedures and practices (shortcuts, truncated processes) being employed by the United States Appellate Court System, the Ninth Circuit in particular, violate the Equal Protection Clause of the United States Constitution?

2. Do those procedures and practices, particulary in the Ninth Circuit, usurp, restrict or otherwise violate the statutory right of appeal?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The Memorandum of the Ninth Circuit is set forth in the Appendix and is unpublished.

A timely Petition for Rehearing was filed, denied and is set forth in the Appendix.

JURISDICTION

The Ninth Circuit Court of Appeals affirmed the District Court on April 27, 1999.

Petitioner sought rehearing arguing that the Court of Appeals had misapprehensions but since it had not seen fit to explain its reasoning the petitioner had to guess at the Court's rationale.

The Ninth Circuit Court of Appeals denied Petitioner's timely petition for rehearing on 28 March 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. & sect. 1254

The Ninth Circuit's memorandum and subsequent order denying rehearing resulted in fundamental unfairness and a violation of the equal protection clause and the right to appeal.

CONSTITUTIONAL/STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides that "no State shall ... deny to any person within its jurisdiction the equal protection of the laws."

Mary Smyly respectfully petitions for a Writ of Certiorari to review the judgment of the Court of Appeals of the Ninth Circuit.

STATEMENT OF THE CASE AND ARGUMENT

1. Case in District Court

I, plaintiff Mary Smyly, an African-American woman, was employed by defendant, IBM, for twenty-four years. Beginning in or about 12/89, IBM began engaging in a continuous course of conduct designed to deprive me of benefits of my employment because of my race and age as well as to retaliate against me for raising complaints of discrimination internally to IBM through their open door process and externally by EEOC complaints on my personal issues and as a part of a class action challenging IBM's discriminatory personnel policies (especially the "ranking" process) and practices and, further, for petition-

ing the Department of Labor to investigate and copying newspapers resulting in an article in the San Jose Mercury.

IBM's pattern of discrimination and retaliation included:

1. repeated failure to promote me to managerial positions;

2. repeated failure to offer me equal opportunities or work consistent with my education and experience & to allow me to demonstrate viable and competitive skills to qualify for level and management promotions on merit as well as by the ranking criteria "overall contributions" to IBM;

3. repeated failure to allow me to acquire new, complementary skills necessary to qualify me for level promotions and to demonstrate capability to perform competitively under all aspects of IBM's personnel policy (performance, planning, counseling and evaluation [ppc&e] and practice;

4. repeatedly subjecting me to racial slurs & other harassment;

5. demoting me and the other African-American when others at our position retained their jobs as staff to second line management;

6. creating a hostile, toxic working environment which caused such severe emotional distress and physical illness that I removed myself and sought medical care and was put on medical leave by my physician;

7. terminating my employment on the retaliatory pretext, according to IBM's summary judgment memorandum, that I 1) was insubordinate which led to my being put "on notice" 2) failed and refused to substantiate my need for medical leave 3) made threats of violence against management 4) failed to explain myself after being given a so called "last chance" to do so.

The major events in the course of the proceedings are:

1. My EEOC/DFEH complaint was filed on 3/9/92 with five causes of action: breach of employment agreement, breach of the implied covenant of good faith and fair dealing, race discrimination, age discrimination and retaliation.

2. About 11/13/92 an EEOC charge was filed against IBM (adstar) by William Scott as primary complainant with Dan Harris and me constituting a class action against IBM's discriminatory personnel policies, ppc&e, and practices.

3. In a letter dated 14 December 92 the EEOC offered Mr. Scott a no fault settlement agreement and affirmed that "the July ranking for IBM adstar employees was rescinded due to your charge of discrimination." The proposed agreement specifically states that the respondent (IBM) "agrees not to retaliate against charging party for filing a charge of discrimination with the EEOC. The letter states that if Mr. Scott chose not to settle the "Commission will enter into an agreement on behalf of the class". Scott chose not to settle.

4. Effective 4/21/93 I was terminated from employment after twenty-four years with notice given of termination after the effective date and while on disability leave.

5. On 7/29/93 my former counsel, Kotoske, filed an amended complaint containing claims of race discrimination, age discrimination and retaliation including harassment, denial of opportunities and termination of employment.

6. On 7/9/93 a joint case management conference was held in which the district court set deadlines for discovery and pretrial motions and established dates for the pretrial conference & trial.

7. On 11/19/93 ex-counsel Kotoske moved to compel IBM to produce documents regarding all internal and ad-

ministrative agency complaints of race and age discrimination and a listing of all lawsuits filed for the previous five years. In a 12/20/93 hearing Magistrate Judge Edward Infante ordered that IBM produce the documents only for the period of 1/1/90 thru 4/30193.

8. In 2/94, when Kotoske again absolutely refused to do depositions & to interview my witnesses and demanded that I settle for an amount he had decided on according to his matrix. I instructed him to do so and get on with preparation for trial. On 3/29/94 Kotoske moved to withdraw & on 5/3/94 Judge Whyte granted his motion.

9. IBM filed a motion to compel my medical records, which despite my opposition, on 6/21/94 Magistrate Judge Infante granted.

10. On 19 August 1994 IBM moved for summary judgment.

11. On 9/14/94 Burdick & Sanders aka Prima Legal Services were substituted as my counsel. They asked for an order shortening time for hearing of defendant's motion for summary judgment and trial & to re-open discovery and expert disclosure. On 10/29/94 Judge Whyte denied reopening fact discovery and allowed an emotional distress damages expert.

12. A hearing on IBM's motion for summary judgment was held on 12/9/94. On 1/4/95 Judge Whyte granted IBM's summary judgment motion against the age discrimination and retaliation claims but denied IBM's motion against the race discrimination claim.

13. On 6 Jan 95 the joint pre-trial conference statement was filed.

14. On 1/24/95 the settlement conference began with my being present. Judge Infante ordered that the conference continue and conclude by telephone on 1/25/95 and excluded my participation contrary to his standing order

on who must be present with authority to settle. I had instructed my former attorney, Burdick, that I didn't want to settle on the terms offered by IBM. She did not tell Magistrate Infante.

15. Without my consent or knowledge on 2/7/95 Burdick wrote Judge Whyte and Magistrate Judge Infante asking for stays of deadlines and Infante granted her requests on 2/13/95. Had I known about this letter I might have prevented her from lying to the court because my mother wasn't in Kentucky and wasn't ill and my grandmother didn't expire in 11/94. Burdick is not entirely credible but the district court believed her over me.

16. In mid-February 95 I received a settlement proposal that burdick & sanders insisted that I sign or they would withdraw. I refused because I had not agreed & did not agree to its contents. On 1 march 95 they moved to withdraw.

17. About 21 march 95 IBM filed papers to impose settlement.

18. On 4/10/95 my letter stating my positions on attorney misrepresentations, judicial errors, prima's motion to amend complaint, prima's motion to withdraw, and opposition to IBM's "motion to enforce settlement and for sanctions" was filed.

19. On 12 April 95 I sent a letter to the court, former counsel, and IBM's counsel stating my settlement counteroffer.

20. On 04/12/95 IBM, in its reply to my opposition to enforcement, challenged the credibility of my ex-counsel Burdick.

21. On 4/14/95 during the hearing Burdick & Sanders asked not to be removed as counsel. They affirmed that they did not discuss general releases with me, that there was no discussion of my right or lack thereof to seek employment at IBM, that such an expectation is not a "stan-

dard provision in a contract.

22. At the court's request IBM submitted a supplemental memorandum alleging to show my knowledge of a settlement precondition that I not be allowed (re)employment at IBM and I submitted my response to it.

23. On 06 Sept. 95 Judge Whyte imposed IBM's settlement on me which contained misstatement and provisions not agreed upon.

24. About 10/26/95 IBM moved for order adjudging me in contempt for not obeying a court order to sign the court imposed settlement.

25. On 9/26/95 I submitted a letter to the district court requesting reconsideration on the issues of 1) former counsel's withdrawal, 2) settlement imposed by court order, 3) the involvement of IBM counsel Madison and IBM legal agent, Liberty Mutual, in wrongful denial of my workers compensation claim though IBM had the required information in its possession by court order, and 4) my reporting the workers compensation violation issues to the Santa Clara district attorney's office so I would not be falsely accused of insurance fraud as well as assault. IBM denied any wrongdoing in writing. As result of the letters submitted to the court on 11/15/95, the court issued an "order re further proceedings" "advising plaintiff, defendant and their respective counsel that it intends to act further in this case only on a properly noticed motion by a party."

26. About 8 Dec 95 I filed a motion for leave to file a motion for reconsideration of the settlement enforcement.

27. On 21 march 97 IBM filed a motion to dismiss. On 22 August 97 the court denied IBM's motion subject to my signing the court's rewritten version of what the court imposed.

28. On 9/15/97 I filed my objections and my motion for recusal and review. On 10/2/97 IBM filed a motion to dis-

miss. On 12/12/97 Judge Whyte held a hearing, denied my objections and "all other motions or requests plaintiff labeled as a request for review, objections, or in any other fashion", denied my motion to recuse and granted IBM's motion to dismiss because I refused to agree to the settlement he imposed on me.

2. Case in Appellate Court and Argument

Violation of Statutory Right of Appeal & Violation of Equal Protection Clause

Although the right of appeal is so far statutorily guaranteed, the Ninth Circuit has illegally denied it by subjecting me to a series of procedures and rulings which inhibit full access to the courts.

Consider first, that in the Federal Rules of Appellate Procedure for the Ninth Circuit it states that staff attorneys "assign a numerical point designation to the case reflecting the relative amount of judge time that likely will be spent in the matter. Cases suffering from clear jurisdictional defects are processed through a motions panel as soon as the defects are detected." (Note that no criterion for the assignment of this "numerical point designation" is explained). The Rules further say that law clerks "prepare memorandum for oral presentation to three judge panels, principally in cases where no oral argument is calendered," and "motion attorneys present all motions to three judge panels or the Appellate Commissioner"

However, Justice Thomas of the Ninth Circuit asserts in his statement to the Commission on Structural Alternatives for the Federal Court of Appeals that "The Pro Se Unit of the staff attorneys' office effectively manages and concludes thousands of pro se appeals each year." He also asserts that the Pro Se Unit is an administrative unit.

Administrative units have no judicial authority. They are not authorized by law to conclude cases; that is an improper delegation of authority. The staff has blocked

access to the judges/court as well as making decisions for which they are not authorized.

Secondly, consider that in Circuits other than the Ninth, as stated in the Commission testimony oral argument is always granted but perhaps only to attorneys who request it. That suggests that pro se litigants are being subjected to a second class standard of justice. Chief Judge Hatchett of the Eleventh Circuit is in favor of granting oral argument even to pro se litigants which by her question seemed to surprise Judge Rymer of the Ninth Circuit. In the Lopez-Lukis case in the Eleventh Circuit the Judges state that "It is important for litigants to know what a court's ruling is, that their cases were fairly considered. In addition, it is desirable generally for litigants to understand the rationale for the court's decision. Oral argument and summary affirmance serve that purpose. The Rule 36-1 affirmance in this case occurred after oral argument, in which the parties were given an opportunity to present their arguments and to hear from the court. We thought the in-court discussion among the judges and the lawyers would make the panel's rationale apparent to the litigants ..." Apparently these kinds of considerations for litigants is not available in the Ninth Circuit and if they are perhaps only to privileged, aka represented, parties.

There seems to be a profound disdain for certain classes of litigants as is shown by analysis of the Commisison testimony and by the research of scholars like Professors Reynolds and Richman. Professor Richman states "Today, the "routine" appeals of the system's least wealthy and powerful litigants get no argument, no conference, no written, published precedential opinion and little personal attention of the Article III judges. Instead, they receive bureaucratic treatment of the hands of the central staff." Some of the classes of cases research has identified as being accorded second class justice are "social security liti-

gation, civil rights cases, pro se appeals, and prisoner petitions". The case at hand falls into a couple of those categories. Professor Richman maintains that "The basis guarantee of justice to all in equal measure suffers under any regime that allocates justice differently according to the wealth and sophistication of the litigants." Supreme Court Justice Breyer submitted to the Commission that "The federal judge is meant to be independent and conscientious, devoting the time and attention that a particular litigant's individual legal problem requires for proper decision, irrespective of the litigant's wealth, position, or power." Given the current "crisis" and the debates over solutions and the experiments across the circuits what is being done to assure full, fair, and equal justice for the citizenry "in the meantime"?

THE SMYLY V IBM APPEAL

1) APPELLANT FILED OPENING BRIEF USING THE PRO SE FORMAT PROVIDED BY THE NINTH CIRCUIT AND ACCORDING TO THE RULES AND REGULATIONS OF THE CIRCUIT.

2) APPELLEE, IBM. FILES ITS ANSWERING BRIEF.

3) APPELLANT, SMYLY, FILES TIMELY REPLY BRIEF.

4) THE COURT SENDS NOTICE THAT IT IS CONSIDERING SUBMISSION OF THE CASE TO AN NON-ARGUMENT PANEL; THE COURT SEND THE CASE TO AN ARGUMENT PANEL AFTER APPELLANT PETITIONS FOR ORAL ARGUMENT

5) ORAL ARGUMENT IS DOCKETED AND APPELLANT TRAVELS FROM KENTUCKY TO CALIFORNIA TO FULLY ARGUE HER CASE EXPECTING THE INTERACTION WITH THE COURT IN ASSESSING THE ERRORS OF THE DISTRICT COURT.

6) THE COURT ISSUES AN ORDER DENYING ORAL ARGUMENT STATING PURSUANT TO CIRCUIT RULE 34-4 THE CASE WOULD BE SUBMITTED ON THE BRIEFS AS THE FACTS AND LEGAL ARGUMENTS ARE ADEQUATELY PRESENTED IN THE BRIEFS AND THE RECORD;

APPELLANT HAS NO GROUND ON WHICH TO PETITION FOR RECONSIDERATION BECAUSE RULE 27-10 REQUIRES THE PETITIONER TO "STATE WITH PARTICULARITY THE POINTS OF LAW OR FACT WHICH, ... THE COURT HAS OVERLOOKED OR MISUNDERSTOOD". SINCE THE COURT HAS NOT YET MADE ANY STATEMENT WHATSOEVER THE PETITIONER HAS NOTHING TO CHALLENGE AND ESPECIALLY NOT WITHIN THE DIRECTIVES OF RULE 27-10.

7) A MEMORANDUM WAS ISSUED DENYING APPEAL WITHOUT GIVING A RATIONALE. THE SUMMARY OF THE CASE AS STATED IN THE COURT'S MEMORANDUM LEAVES OUT SIGNIFICANT FACTS AND CIRCUMSTANCES WHICH SHOULD HAVE BEEN CONSIDERED AND HAD IT BEEN DONE WOULD HAVE ALTERED THE OUTCOME OF THE APPEAL. THERE ARE NO REFERENCES WHATEVER TO APPELLANT'S CASELAW OR TO THE CALIFORNIA LAW WHICH MAKES THE DISTRICT COURT'S ORDER IMPOSING SETTLEMENT ILLEGAL.

AGAIN, PETITIONER HAS NO BASIS WITHIN THE DIRECTIVE OF FRAP 40, PETITION FOR PANEL REHEARING, TO SUCCESSFULLY PETITION FOR REHEARING.

When citing the standard of review, the Ninth Circuit references *Maynard v. City of San Jose,* 37 F.3d 1396, 1401 (9th Circuit 1994) but fails to notice that this case is

amazing similar to the one at hand and was decided in the opposite fashion. That the Appellate could reference a case so similar and rule differently and without explanation has to case suspicion on the Ninth Circuit's procedures and practices.

8) AN ORDER DENYING APPELLANT'S PETITION FOR REHEARING WAS ISSUED WITHOUT COMMENT OR ANY INDICATION OF THE REASON FOR THE DENIAL.

Federal Rule of Appellate Procedure 40, Petition for Panel Rehearing, states that the "petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition". Since the "memorandum" affirming the lower court made no reference to any points of law and completely ignored fact and circumstances which significantly alter the limited summary stated in the memorandum there was nothing petitioner could do but restate her original points of her brief.

As Judge Carolyn Dineen King of the Fifth Circuit of Appeals stated "... litigants would more likely be persuaded that we have at least paid some attention to their case if we give succinct, particularized reasons for the decision. The petition for rehearing cannot serve its function of identifying error by the panel if no reasons are given and the litigant feels compelled simply to regurgitate his or her brief in order to be sure that the panel understood his or her point" and "giving reasons, however briefly, provides a basis for accountability of the panel and the system generally."

By not ordering conferencing, by denying oral argument, by not stating any points of law (absolutely no mention was made of the caselaw or the California law that made the District Court's ruling illegal that I presented) and by ignoring all the critical facts in the record and by

not issuing an opinion, the Ninth Circuit Appellate Court usurped my statutory right of appeal.

Justice Stevens has observed that unpublished decisions are "secret law" that result in "decision making without the discipline and accountability that the preparation of [published] opinions requires." *County of Los Angeles v. Kling*, 474 U.S. 936, 937 (1985).

> " '(If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus the opinion serves as a steadying factor which aides reckonability." ' (*Id.* at 937 n.6 (Stevens, J., dissenting) (quoting K. Llewellyn, The Common Law Tradition 26 (1960), as quoted in W. Reynolds & W. Richman, *The Non-Precedential PrecedentóLimited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167, 1204 (1978))

The sequence of events in *Smyly v. IBM* including not "publishing" an opinion even to the parties constitutes "secret law".

> "Public availability of judicial opinions helps to hold judges accountable to society for the decisions they reach. Public scrutiny helps to maintain the integrity of the judicial system and assure that individual cases are fairly decided.
>
> "When a judge's reasoning in a particular case is open to public scrutiny, litigants may be less likely to believe that the decision was arbitrary or unfair. Therefore the public availability of [] opinions promotes judicial accountability, which may also enhance public confidence in the legal system." (K. Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 Cal. L. Rev. 541, 567 (1997)
>
> "The quality of appellate review that particular classes of litigants receive (per Reynolds & Richman) should itself be a sufficiently odious violation of the Equal

> Protection Clause to require Supreme Court review". That appellate courts may continue to wrongly decide low profile cases for years because their errors are not brought to public attention" ought also to warrant Supreme Court review". The studies of Professors Reynolds and Richman on the issues of fairness for certain classes of litigants plus the evidence of my particular case should be more than sufficient for the granting of a Writ of Certiorari.

The Court should therefore grant the petition for a writ of certiorari and rule that the Appellate Court has denied Petitioner equal protection of the law and full and fair right of appeal. The Ninth Circuit should be reversed to allow a full and fair hearing.

CONCLUSION

That the Appellate system is in 'crisis' due to overload is not at issue as scholars and judges agree. But the experiments the different circuits have implemented have neither resulted in uniformity nor evenhanded administration of justice for our citizens.

Judge Hug says that the Ninth Circuit is functioning well but that must be administratively, i.e. case termination rates. But that wellness is not apparent when the Appellate Courts are looked at from the viewpoint of making sure that the District Courts are right and right for sound reasoning.

The petition for a writ of certiorari should be granted.

DATED: 25 August 1999.

Respectfully,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-15075
D.C. No. CV-93-20149-RMW

MARY C. SMYLY, - - - - *Plaintiff-Appellant,*

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, - - - *Defendant-Appellee.*

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

ORDER—Filed May 28, 1999

Before: GOODWIN and TROTT, Circuit Judges, and KING,* District Judge.

The Petition for Rehearing is DENIED.

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*Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-15075
D.C. No. CV-93-20149-RMW

MARY C. SMYLY, - - - - *Plaintiff-Appellant,*

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, - - - *Defendant-Appellee.*

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Submitted April 13, 1999**
San Francisco, California

MEMORANDUM—Filed April 13, 1999**

Before: GOODWIN, TROTT, and KING,*** District Judge)

Mary C. Smyly appeals pro se the district court's order dismissing her complaint for failure to comply with court orders and to diligently prosecute the consummation of the settlement. We have jurisdiction under 28 U.S.C. § 1291, and we AFFIRM.

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* This disposition is not appropriate for publication and may not be citetto or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

*** Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

A district court may dismiss an action with prejudice "[for failure of the plaintiff to prosecute or to comply with any order of court." Fed. R. Civ. P.41(b). We review a dismissal under Rule 41(b) for abuse of discretion. *See Johns v. County of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997); *Al-Torki v. Kaempen*, 78 F.3d 1381, 1384 (9th Cir. 1996). A district court's decision regarding the enforceability of a settlement agreement is reviewed for abuse of discretion. *See Maynard v. City of San Jose*, 37 F.3d 1396, 1401 (9th Cir. 1994). "Reversal is appropriate only if the court based its decision on an error of law or clearly erroneous findings of fact." *Id.* (quotation omitted).

A careful review of the record supports the District Court's dismissal. The parties, through counsel, negotiated a settlement on January 24, 1995 with a United States Magistrate Judge acting as settlement judge. The terms were placed on the record. The Magistrate Judge confirmed that Smyly participated at virtually every stage of the negotiations and, more importantly, had expressly agreed to the terms of the settlement at the settlement conference. After a lengthy evidentiary hearing, including testimony from counsel and Smyly, the District Judge found that a definitive settlement had been reached. On September 6, 1995, he ordered the settlement enforced. Substantial evidence in the record supports the District Judge's findings. The District Court did not abuse its discretion in enforcing the settlement agreement. See *Maynard*, 37 F.3d at 1401.

After Smyly refused to consummate the settlement by signing settlement documents, IBM sought to hold Smyly in contempt. Over a year later, on September 18, 1996, the Court refused to hold Smyly in contempt but again confirmed that a binding settlement had been reached. The Court ordered the parties to prepare and execute a release and dismissal in accordance with the Court's instructions. In its September 18, 1996 Order, the Court twice specifically warned Smyly that failure to comply with its Order would result in dismissal of her case.

On January 8, 1997, the Court granted partial reconsideration and allowed worker's compensation claims to be excluded from the release. The Court again ordered compliance with the September 18, 1996 Order, and instructed Smyly to advise IBM regarding payment or, absent instructions, allowed IBM to satisfy its obligation by depositing fluids with the Court.

Smyly again refused to consummate the settlement, conceivably because of a dispute about the release language. IBM filed a Motion to Dismiss. After extensive briefing, on August 22, 1997 the Court denied IBM's Motion, subject to the parties' compliance with its Order regarding the settlement. The Court prepared its own language for a release, which conformed to the settlement as the Court had enforced. The Court gave Smyly until September 12, 1997 to sign the release. The Court again notified Smyly that if she failed to comply with the Court's Order, IBM could renew its application for dismissal. Smyly failed to comply.

Accordingly, IBM filed another Motion to Dismiss. On December 12, 1997 — nearly three years after the settlement had been put on the record — the District Court dismissed the action for Smyly's failure to comply with court orders and failure to diligently prosecute consummation of the settlement. At the hearing, the Court explained:

> I think we've been over many of these things many times before, and the Court did make an Order enforcing the settlement.
>
> The Court has tried to bend over backwards on behalf of both sides to try and avoid any communication problems between the parties following the consummation of the settlement.... But the Court went through and tried to make a release that was totally consistent with what it found to be a settlement.
>
> Ms. Smyly has chosen, for her reasons, not to go forward with it, and I think this case has come to an end[.]

Under these circumstances, we cannot say the District Court abused its discretion in dismissing the action under Rule 41(b). The District Court allowed Smyly several opportunities to present her views regarding the settlement. The record supports the finding that there was a binding settlement. The District Court displayed considerable patience, especially after Smyly's counsel withdrew and she proceeded pro se.[1] The Court gave her ample notice that failure to comply with court orders would result in dismissal, and gave Smyly several chances to obey its rulings. The District Court acted well within its discretion in dismissing the action. *See Johns*, 114 F.3d at 876; *Al-Torki*, 78 F.3d at 1384.[2]

AFFIRMED.

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[1] We therefore reject Smyly's argument that Judge Whyte should have recused himself. Adverse rulings are not grounds for recusal. *See Liteky v. United States*. 510 U.S. *540, 556* (1994).

[2] The District Court's prior summary judgment order was rendered moot by the settlement and is not appealable. *See Al-Torki*, 78 F.3d at 1386 (holding that dismissal under Rule 41 (b) for failure to prosecute renders prior interlocutory appeals not appealable).